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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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# No. 693

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WHITING STOKER COMPANY, A NEW JERSEY CORPORATION,

*Petitioner,*

*vs.*

CHICAGO STOKER CORPORATION, AN ILLINOIS CORPORATION

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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*To the Honorable, the Judges of the Supreme Court of the United States:*

Petitioner, Whiting Stoker Company, respectfully shows as follows:

That it is a corporation organized and existing under the laws of the State of New Jersey, and that defendant, Chicago Stoker Corporation, is a corporation organized and existing under the laws of the State of Illinois.

The complaint herein was filed in the District Court of the United States at Chicago, Illinois, on October 31, 1945,

to obtain a declaratory judgment settling between the parties, (1) the proper construction of a contract under which they had been operating on the theory that it was ambiguous; and (2) to declare that there was an accord and satisfaction under plaintiff's theory of the contract, by acceptance and use of a check offered on plaintiff's theory.

In its answer, the defendant contended that the contract was plain and unambiguous; yet, while showing that the parties had contentiously disputed over the effect of the contract provisions, defendant denied that there had been an accord and satisfaction by use of the check.

Issues were made on the proper construction of the contract and on the question whether there had been an accord and satisfaction.

On those issues the Court took the testimony of the parties, adjudged the contract was ambiguous, so decided, and decreed that there had been an accord and satisfaction between the parties of all disputed sums due under their relationship, and that plaintiff had complied with the controversial provisions of the contract in question.

On appeal, the Court of Appeals (Seventh Circuit) reversed the District Court, holding there was no ambiguity in the contract and that there was no accord and satisfaction. To reverse the judgment of the Court of Appeals, certiorari is here sought.

## Summary Statement of the Matter Involved

The defendant, Chicago Stoker Corporation, an Illinois corporation, was in business in Chicago, selling certain stokers and stoker parts, and servicing stokers with repairs and parts.

The plaintiff, Whiting Stoker Company, is a New Jersey corporation, organized to purchase and take over the business of the Chicago Stoker Corporation.

Briefly stated, the plaintiff purchased the going business of manufacturing, selling, and servicing stokers, carried on by the defendant, with its rights to manufacture, and with its tools, dies, etc., for which $50,000 was paid in cash, and covenants made to pay yearly royalties, spoken of in the contract as emoluments. For the stokers on hand fixed prices were to be paid. From the stock pile or inventory of stoker parts, plaintiff was to immediately select and pay for $25,000 worth of parts. For the balance of the stock pile of parts the contract provided, in paragraph B-2, the one here in controversy, as follows:

> ". . . and to purchase and pay for within one year from the date hereof all of that portion of the remainder of said stock of parts which can reasonably be utilized by the buyer." (Tr. 15.)

During the first year, a dispute developed over the practical interpretation of the above quoted provision of the contract, plaintiff claiming it was intended that it should purchase only such parts in the inventory as were reasonably utilizable within one year from the date of the contract while operating as a going business; and defendant contended that plaintiff was obligated to purchase and pay for within the year all parts that could reasonably be used at any time, whether within the first year or at any time thereafter.

The contract provided that plaintiff should make monthly reports of usage of parts and pay for them monthly at fixed prices. Those reports were made.

At the end of the year's operation, the matter being acutely in dispute, plaintiff had its auditors check with defendant's accountants to determine the exact usage of the parts during the year and sent defendant a check covering the amount plaintiff claimed to be due, with an invoice of transactions for the year of operations, and in the accom-

panying letter sent the auditors' summary of used parts which, plaintiff said, "also indicates the balance of inventory belonging to you at August 31, 1945."

Because the suit involves two distinct issues, the facts pertaining to each will be recited separately.

First, as to the ambiguity in the contract.

## I

### As to the Alleged Ambiguity of the Contract

The controversy here is over what quantity of the remaining portion of the inventory plaintiff was obligated to purchase: whether it was to purchase all parts that could *reasonably be utilized within the first year of operations,* or whether plaintiff should purchase and pay for *within the first year* all parts that could reasonably be used *at any time, whether within the first year or at any time thereafter.*

The defendant was a servicing company and had on hand two stoker inventories, one of which was its own with which we are here concerned; the second inventory was one held on consignment belonging to a third corporation, the Whiting Corporation of Illinois, which inventory is dealt with in the contract by provisions made for the benefit of said Whiting Corporation, but with which we are not concerned here, except incidentally, in construing the contract. This inventory had been held by defendant under a purchase-as-used arrangement with the Whiting Corporation similar to the contract here in question but with no time limitation (Tr. 359-366). To protect the interests of the Whiting Corporation in its inventory, the provisions for its benefit were included in the contract here in question.

Defendant's own inventory, one of which consisted of stokers and stoker assemblies, new; the other being a stock pile of repair parts which contained a large and unknown

quantity of returned, rejected, defective, obsolete and little-used miscellaneous parts which had accumulated because the customary periodical scrapping or junking of such parts had not been carried out for some time, and such parts were thrown back and retained in the stock pile, much of which was eight or nine years old. (Tr. 219-220.) Because of this known condition of defendant's inventory of parts, plaintiff refused to purchase defendant's inventory outright, but was willing to resort to the stock pile for parts when and as needed. Defendant was in need of ready money with which to discharge existing obligations, and plaintiff agreed to purchase outright, and immediately, $25,000 worth of parts so as to relieve defendant's needs, and then purchase parts from that inventory as needed. (Tr. 64, 77, 209.)

That having been agreed upon, Paragraph B-2 of the contract was written as follows:

> "2. To purchase and pay for, additionally, immediately upon the execution of this contract, $25,000.00 worth of stoker parts to be selected from the Seller's present stock thereof by one A. E. Bottenfield, acting on behalf of the Buyer; *and to purchase and pay for within one year from date hereof all of that portion of the remainder of said stock of parts which can reasonably be utilized by the Buyer.* . . ." (Tr. 15.) (Italics supplied.)

The whole inventory, as it then existed, and without sorting, was to be shipped to Superior, Wisconsin, there to be stored at plaintiff's expense, and resorted to by plaintiff as occasion required. (Tr. 63-64.)

When it was settled that plaintiff would not buy defendant's inventory in bulk, defendant raised the price of the parts so that the purchase by plaintiff of usable parts as needed would compensate for loss on the parts not usable. This plaintiff agreed to, on the theory the cost would be

added to price of the part when used. (Tr. 191-193; 247-248.)

When the contract had been finally signed, the inventory and other assets purchased by the plaintiff were packaged, F.O.B. the Chicago plant, and shipped to Superior, Wisconsin, where the plaintiff was equipped with a plant and ready to carry on the going business purchased. The plant had all the facilities necessary to carry on the manufacture, assembly and servicing of stokers. (Tr. 260.)

**Plaintiff's Contention**

Plaintiff's construction of the contract was that it was obligated to purchase, out of the remaining inventory, during the period of one year from the date of said contract, all such parts as could reasonably be utilized in the ordinary prosecution of its going business from day to day, but no longer than one year.

**Defendant's Contention**

The defendant says that the plaintiff should have, within the year, selected from the defendant's inventory all parts that the plaintiff could reasonably use at any time in its business, *However remote*, and pay for them, *within the year*. In other words, the defendant is, in effect, contending that the plaintiff had *bought* all usable parts of the defendant's inventory and had a year within which to *select and pay* for them.

**The Holding of the Trial Judge**

The trial judge, having heard all the evidence, held that it was the actual intention of the parties that the stock pile was to be resorted to from day to day for utilizable parts during the year from date of the contract.

**The Opinion of the Court of Appeals**

The Court of Appeals held there was no ambiguity and so concluded when it added these words to the paragraph "whether the parts were actually used during the first year or thereafter."

Differences of opinion arose in the practical execution of the contract, resulting in this litigation.

**Contention as to Ambiguity**

The sentence in Paragraph B-2:

> ". . . and to purchase and pay for within one year from the date hereof all that portion of the remainder of said stock of parts which can reasonably be utilized by the buyer",

is not a completed thought, in that it does not state the period of time of use of the stock piles. The paragraph could have been concluded with the statement, "during said year", as the plaintiff understands it; or, the sentence could have ended with the words, "*whether the parts were actually used during the first year or thereafter,*" as the Court of Appeals made it read. It is contended that, as neither of those thoughts are specifically expressed or necessarily implied in that, nor in any other part of the contract, the contract is ambiguous; and, being ambiguous, it was for the Court to determine from the background of circumstances what the parties intended, and to so declare the intention.

There are six provisions of the contract, found in paragraphs A-2, B-2, B-3, B-4 B-8 and C-2, which have a bearing upon the intention of the parties as to the period of use by petitioner of the defendant's inventory.

Paragraphs A-2, B-2, and C-2 refer in definite terms to the period of "*one year from the date hereof.*" Paragraph A-2 refers to the option given to petitioner to purchase

the whole inventory of parts *within one year;* paragraph B-2 refers to the resort to the inventory for the purchase of usable parts *within one year;* and C-2 fixes the right of defendant to sell what remains upon "*the expiration of one year,*" all "*from the date hereof.*"

The three paragraphs, A-2, B-2, and C-2, are as follows:

> "A. 2. (Seller agrees) To sell, set over, transfer and assign to the Buyer, in addition thereto, $25,000.00 worth of stoker parts to be selected from the Seller's present stock thereof by one A. E. Bottenfield, acting on behalf of the Buyer; and to grant to the Buyer the right and option to purchase within one year from the date hereof the remainder of said stock of parts and also the Seller's entire stock of Whiting, King Coal, Butler and Continental Stokers, at the following prices: . . ."
>
> "B. 2. (Buyer agrees) To purchase and pay for additionally, immediately upon the execution of this contract, $25,000.00 worth of stoker parts to be selected from the Seller's present stock thereof by one A. E. Bottenfield, acting on behalf of the Buyer; and to purchase and pay for within one year from date hereof all of that portion of the remainder of said stock of parts which can reasonably be utilized by the Buyer and also Seller's entire stock of Whiting, King Coal, Butler and Continental stokers, all at the prices hereinbefore set forth in paragraph A2 of this agreement."
>
> "C. 2. (Mutually agreed) That, upon the expiration of one year from the date hereof, the Seller and the Whiting Stoker Corporation, respectively, shall have the right to sell in the open market or to otherwise dispose of as they may see fit all such items from their respective stocks of stokers, stoker parts and subassemblies as have not theretofore been purchased by the Buyer pursuant to the terms of this contract."

Paragraph B-3 is the provision as to the stokers and parts of the Whiting Corporation which did not sign the contract. The obligation in this paragraph is to purchase

"within a reasonable time hereafter" all that portion of the Whiting Corporation's stokers and parts "which can reasonably be utilized by the Buyer." No question is raised as to the performance of the provisions of this paragraph, but it has a bearing upon the construction of the contract. Paragraph B-3 is as follows:

> "B. 3. (For benefit of Whiting Corporation which did not sign the contract) To purchase from the Whiting Corporation, an Illinois corporation having its principal place of business at Harvey in the State of Illinois, within a reasonable time hereafter, all that portion of the Whiting Corporation's present stock of Whiting, King Coal, Butler and Continental stoker parts and sub-assemblies which can reasonably be utilized by the Buyer and to pay said company therefor the same prices now being paid to it by the Eddy Stoker Corporation for such parts and sub-assemblies, being the Whiting Corporation's standard factory cost, including factory overhead, but excluding general administrative overhead."

Paragraph B-4 has to be construed in the light of the provisions found in paragraphs A-2, B-2, B-3 and C-2.

Paragraph B-4 is as follows:

> "B. 4. To refrain from manufacturing or purchasing elsewhere any such stoker parts or sub-assemblies until that portion of the Seller's and Whiting Corporation's stock of stokers, parts and sub-assemblies which can reasonably be utilized by the Buyer shall have been completely exhausted."

Petitioner suggests that said paragraph B-4 deals, generally, with the inventorys of new stokers, parts and sub-assemblies, of both defendant and Whiting Corporation and refers to exhaustion of such inventories of the respective corporations within the limitations in B-2 and B-3, i. e., within one year in B-2 and within a reasonable time in B-3,

whichever happens first, the exhaustion of such inventory or the expiration of the time; and is a limitation upon time and use, and not an enlargement of obligations beyond the time limitations of paragraphs B-2 and B-3. Paragraph B-4 appeared in the contract between Whiting Stoker Company and defendant corporation (Par. 12, Tr. 363) under which defendant was selling from Whiting Corporation's inventory which was taken over by plaintiff and obviously was inserted in the contract here in question for the benefit of Whiting Corporation, along with paragraph B-3. It only adds another ambiguity necessary to be explained by the evidence.

Paragraph B-8 requires plaintiff to remit monthly for parts used out of the stockpile for repairs and servicing, and for all stokers and sub-assemblies sold in the previous month. (Tr. 16)

**This Suit Concerns Only the Defendant's Stock Pile**

This litigation has to do only with the inventory or *stock pile of parts* which plaintiff had refused to buy outright from defendants, and has nothing to do with either paragraphs B-3, or B-4.

The significance given to paragraph B-4, that in the opinion of the Court of Appeals, that it was inserted to insure the sale of *all of the inventory* that was reasonably usable, is clearly a misconception of the contract, and erroneous. Under the theory of either petitioner or defendant, paragraph B-4 would have no application as to the defendant's stock pile after the one year period.

Paragraph B-8 required plaintiff to make a monthly report of parts used from the stock pile, and pay for them on the 25th of the month following the month as parts "shall have been *used* by the buyer", a clear indication the parts were sold on a *pay-as-used* basis.

The Court of Appeals in reaching its conclusion that the contract was unambiguous stated what it conceived to be the meaning of paragraph B-2; and, in so doing, added certain words thus stating what *it thought* was the meaning of the language instead of turning to the surrounding circumstances attending the formation of the contract, as shown in the record, to find the *intention of the parties.* The Court of Appeals said:

> "Paragraph B-2 of the contract obligated plaintiff to purchase and pay for within one year from the date hereof all of that portion of the remainder of said stock of parts which can be reasonably utilized by the buyer. We think these words can reasonably convey only one meaning, namely, that within one year, plaintiff was to purchase and pay for all parts that it could reasonably utilize, irrespective of whether the parts were actually used during the first year or thereafter." (Tr. 460.)

The trial court, after hearing the evidence, judicially expressed the meaning of the parties, saying:

> "That the plaintiff is to purchase from the defendant, and is to pay for, all that portion of the remainder of said stoker parts which the plaintiff could reasonably utilize within one year from September 2, 1944." (The date of said contract.) (Tr. 435.)

By its opinion, the Court of Appeals gave a mental impression rather than a judicial interpretation.

Plaintiff claims that the record shows the contract was ambiguous when viewed in the light of the purchase of a going concern, and a refusal to purchase outright an inventory which held a great amount of parts which concededly were junk.

We pass now to a showing of the record on the issue of an accord and satisfaction by acceptance and use of plaintiff's check tendered on its theory of the contract.

## II

### Basis of the Claim of Accord and Satisfaction

At the end of the first year's operation under the contract, the plaintiff took no further parts from the disputed stockpile, and its auditors checked on all amounts due to date on their transactions and also had a thorough check made of the parts used thereunder and verified the amounts and list of parts with defendant's records; a copy of this detailed check-up was sent to defendant with an invoice and a check which contained payment for all stock parts used within one year from the date of the contract and accompanied the invoice and check with a letter of explanation. (Tr. 352.) In this letter, dated November 2, 1945, it is stated that the accompanying check is the result of reconciliations of the two accounts and says, concerning the item of usage of parts from defendant's inventory:

> "We are enclosing the auditor's summary of usage of stoker parts which also indicates the balance of inventory belonging to you at August 31, 1945." (Tr. 352.)

Defendant held this check (to which the invoice was attached) (Tr. 354-355) until December 28, 1945, when it was deposited and collected in due course.

The Court of Appeals, in its opinion, says that the said letter "constitutes the only evidence in the record upon which the finding of the District Judge as to an accord and satisfaction could be based." (Tr. 463.)

We respectfully suggest that in said holding the Court of Appeals distinctly erred, and make the following digest of the evidence pertaining to the dispute over the inventory which shows that the check for the disputed item of usage could not but have been known to defendant to have been tendered upon plaintiff's interpretation of the contract.

**Additional Evidence Before the Trial Judge**

The dispute over paragraph B-2 commenced a few months after the date of the contract. In April, 1945, the parties were disputing over the items selected for the $25,000 cash purchase of parts from the inventory; and plaintiff wrote to defendant plaintiff's Ex. 9 (Tr. 350), which says that defendant's

> "letter dated April 2, makes your motives quite plain, which are to reopen the $25,000 matter and assist you in liquidating outside the contractual requirements another eight or ten thousand dollars of inventory. At no other time either prior to or after the signing of the agreement have we ever contemplated purchasing from you one dollar's worth of obsolete or inactive inventory which could not be liquidated within a year."

On July 2, 1945, plaintiff by letter (Tr. 350) urged defendant to cooperate and

> "reconcile the several records and perhaps come to some decision as to what is to be done with the balance of inventory on hand when the year expires."

To plaintiff's letter just quoted defendant replied on July 9, 1945 (Tr. 351):

> "As to the balance of the inventory on September 2, 1945, we have had no thought but that you would send your check within the one year period stipulated in the agreement."

On August 27, 1945, as the end of the year neared, plaintiff wired defendant, asking for instructions as to disposition of the inventory

> "which we have not reasonably been able to utilize during the year of the contract. Failing to receive your instructions we shall warehouse same at your expense." (Tr. 411.)

To the above telegram and a letter confirming it defendant replied (Tr. 411-412) on August 29, 1945:

> "As the Seller we will not acquiesce in a return to it of said inventory."

To defendant's letter of August 29, 1945, plaintiff wired on August 31, 1945 (Tr. 412):

> "The contract of September 2, 1944, provides that you can dispose of this inventory in any way you see fit, therefore we consider this inventory your responsibility at the expiration of one year. Accordingly we are instructing our Superior plant to warehouse and insure this inventory for your account."

To plaintiff's foregoing telegram defendant replied, giving its interpretations of the contract, crystallizing the disputes, protesting the warehousing of the remainder of the stock of parts for its account and expense, insuring, handling, etc.; offering to take back any parts "clearly not reasonably usable" by plaintiff and market them as it saw fit (Tr. 413); but stated concerning paragraph C-2 of the contract:

> "It is clear from a reading of that paragraph, however, that it merely gives us the *right* to dispose of such parts in the open market, but does not obligate us to do so." (Tr. 414.)

Then, on September 10, 1945, plaintiff wrote defendant asking what procedure plaintiff should follow should it

> "receive an order for a part or parts in this inventory and at what price we should withdraw it" (and stating) "we do not feel we have the authority to withdraw any of the items from it." (Tr. 414.)

**Defendant Demands a Check on Its Theory of the Contract**

To plaintiff's letter of September 10, 1945, the defendant replied on September 29, 1945, that the contract provided that plaintiff should purchase and pay for all stoker parts as might be reasonably utilized by plaintiff

> "until the inventory mentioned shall have been completely exhausted. We expect you to fulfill this obligation. Will you therefore mail us your check in payment and oblige. The prices, of course, are those specified in paragraph A-2 of the contract." (Tr. 415.)

To that letter of September 29, 1945, plaintiff replied on October 8, 1945, regretting that they could not agree

> "on the question of the residual inventory on August 31. The inventory is yours. Under the circumstances, and, considering the fact that you will not give us written instructions permitting us to use this inventory and report and remit as heretofore, we are placing this inventory in Superior warehouse pending your next action." (Tr. 415.)

To that letter defendant replied on October 9, 1945, that its next action was to

> "respectfully request that you complete payment for this merchandise as you undertook to do." (Tr. 416.)

The auditors for the parties then took over in an effort to reconcile the accounts of the parties and usages of parts from the inventory of defendant. This they accomplished as shown by testimony and by defendant's letter of October 16, 1945, stating the results of the work of the auditors representing the parties (Tr. 356).

**Plaintiff Sends Its Check On Its Interpretation of the Contract, and Tenders the Inventory**

Next came the letter of November 2, 1945, enclosing plaintiff's check and stating

". . . which brings our account with you in complete accord with the results of the audit. . . . We are enclosing the auditor's summary of usage of stoker parts which also indicates the balance of inventory belonging to you at August 31, 1945." (Tr. 352.)

The inventory was thus tendered back with the check.

An additional fact before the trial judge was that the defendant held the check for approximately two months after its receipt before cashing it.

In view of that record, we respectfully urge that the learned judge, in formulating the opinion of the Court of Appeals, failed to appreciate that the check was sent to defendant upon the theory that it was accompanied with the balance of the inventory remaining at the end of the year and was in legal effect a tender of the check with the inventory upon the theory that resort to it was required only for the year after the date of the contract.

**Conclusions of the Trial Judge**

The District Judge heard the evidence introduced by the parties and made findings of fact, none of which were questioned upon appeal. It finds that the clauses in the contract with reference to the purchase by the plaintiff from the defendant of stoker parts other than the purchase of $25,000 worth of stoker parts, were ambiguous. The court then finds:

"9. That it was the intention of the plaintiff and the defendant that the plaintiff would purchase from the defendant, and pay for in accordance with the said contract of September 2, 1944, all of that portion of the remainder of said stoker parts which the plaintiff could reasonably utilize within one year from September 2, 1944.

"10. That plaintiff has complied with the terms and provisions of said contract dated September 2, 1944." (Tr. 435.)

On its findings, the Court, in light of the circumstances and evidence, made interpretations of said contract as follows (Tr. 436):

> "2. The Court interprets the contract of September 2, 1944, as follows:
>
> "(a) That the plaintiff is to purchase from the defendant and pay for all that portion of the remainder of stock of stoker parts and sub-assemblies which can reasonably be utilized by the plaintiff within a period of one year from the date of said contract.
>
> "(b) That the plaintiff is to refrain from manufacturing or purchasing elsewhere any such stoker parts or sub-assemblies until the plaintiff has completely exhausted all of said stoker parts and sub-assemblies belonging to the defendant which can be reasonably utilized by the plaintiff within one year from the date of said contract.
>
> "(c) That the said contract of September 2, 1944, shall be construed as a whole, and the various covenants and provisions thereof shall not be deemed to be severable."

The evidence showed that during the first year of operations the parties were disputing over the proper construction of Section B-2 of the contract and whether plaintiff must, within the year, select and pay for all reasonably usable parts remaining in the inventory that were not used during the year, or whether, having, during the year, resorted to the stock pile for all its current servicing needs, the contract had been performed.

### Findings as to Accord and Satisfaction

With reference to the issue of accord and satisfaction, the trial court found as follows (Tr. 435-436):

> "11. That on November 2, 1945, the plaintiff mailed to the defendant a check in the sum of $6,532.75 as pay-

ment in full of all of plaintiff's monetary obligations under the said contract dated September 2, 1944, except emoluments accruing after September 1, 1945, which said check was received by the defendant on or about November 4, 1945, deposited by the defendant on December 27, 1945, to the defendant's account in the Pioneer Trust & Savings Bank, and marked paid January 3, 1946."

Upon the issue of accord and satisfaction, the court concluded (Tr. 437):

> "4. That the receipt of the said check in the sum of $6,533.75 by the defendant from the plaintiff on or about November 4, 1945, the retention of said check by the defendant until December 27, 1945, and the depositing of said check on December 27, 1945, in the defendant's bank, constituted an account stated and was an accord and satisfaction of all monetary obligations of the plaintiff under the said contract, except emoluments (royalties) accruing after September 1, 1945."

The court also held that plaintiff had complied with all terms of the contract; that there was no further obligation on the part of the plaintiff to store the remainder of the inventory at its expense (Tr. 436).

### The Decree of the Trial Court

The court then decreed in accordance with its findings and conclusions and awarded costs to plaintiff (Tr. 437-438).

### The Opinion of the Court of Appeals

The opinion of the Court of Appeals was rendered on December 3, 1948, and appears in the Transcript of the Record at pages 458 to 465. It is also to be found in 171 Fed. (2d) 248, under title of Whiting Stoker Company *v.* Chicago Stoker Corporation.

### The Viewpoint of the Court of Appeals

The findings of the Trial Court were not questioned by the Court of Appeals. Its holding necessarily is that the Trial Court drew the wrong conclusion of law in its interpretation of the provisions of the contract, and erred in holding on the evidence that there was an accord and satisfaction between the parties.

The Court of Appeals concluded that there was no ambiguity in the contract and held that there was no accord and satisfaction and reversed the decree of the District Court with costs.

### Reasons for Allowance of the Writ

I

By its opinion and judgment, the Court of Appeals has effectually destroyed valuable contract rights of the plaintiff by an erroneous construction of contract provisions.

II

The judgment and opinion of the Court of Appeals has reversed the trial court upon a finding of fact where the evidence not only preponderates in favor of the holding, but it is admitted and conclusive; and the holding of the Court of Appeals is not only clearly erroneous, but is contrary to the evidence.

### Questions Presented

1. Did the Court of Appeals err in disregarding the evidence taken by the Trial Court in the declaratory judgment proceeding to determine the intent of the contracting parties as to a clause appearing in said contract, and in placing its own interpretation upon the contract by adding words thereto not contained therein nor necessarily implied?

2. Did the Court of Appeals err in deciding that there was no accord and satisfaction of defendant's claim upon only a portion of the evidence adduced?

3. Was the language in paragraph B-2 of the contract susceptible of more than one interpretation so that the District Court might, in ascertaining the intention of the parties, properly consider and construe the contract in the light of the situation and relationship of the parties, the circumstances surrounding them at the time of making the contract, the nature and situation of the subject matter, and the apparent purpose of making the arrangement?

4. Where the trial court heard the evidence and made findings of fact on the issue of accord and satisfaction which were not questioned in the Court of Appeals as to accuracy, did the Court of Appeals err in ignoring the findings of the trial court and reversing the judgment made upon the findings, by considering only a fraction of the evidence adduced upon that issue?

## Jurisdiction

The jurisdiction of the court is invoked under Section 1254 of the Judicial Code and Judiciary, 28 U. S. C. A., Sec. 1254 (1) and Sec. 2101.

The date of the final order of the Court of Appeals denying rehearing was January 17, 1949 (Tr. 495).

## Errors Relied Upon

The Court of Appeals erred in holding there was no ambiguity in the contract and in holding that there was no accord and satisfaction of the controversy by use of the check in question, and erred in reversing said judgment.

## Prayer

Wherefore, your petitioner prays that this Court allow this petition for certiorari directed to the Court of Appeals for the Seventh Circuit to bring up the record in this cause here to review the judgment of the said Circuit Court of Appeals entered in this cause.

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## BRIEF

### I

Where the language of a contract is susceptible of more than one interpretation, but not otherwise, the Court, in ascertaining the intention of the parties, may and should consider, and construe the contract in the light of the situation and relation of the parties and the circumstances surrounding them at the time of making the contract, the nature and situation of the subject matter, and the apparent purpose of making the contract.

17 C. J. S. p. 744, Sec. 321.

The object of construction is to effectuate the intention of the parties in making a given contract; when the contract is in writing, the language used should be interpreted in the light of circumstance surrounding the parties at the time the contract was made.

*Sand Filtration Corporation* v. *Corwardin,* 213 U. S. 360, 364.

The general rule in the interpretation of written agreements is that the intention of the parties must control and that resort may be had to such evidence written and oral as will show the attending circumstances of the execution, and place the court in the situation of the parties when they signed the writing to be interpreted.

*U. S.* v. *Choctaw Nation,* 179 U. S. 494, 531;
*Olson* v. *Rossetter,* 399 Ill. 231, 241;
*Wolf* v. *Schwill,* 289 Ill. 190, 192;
*Armstrong* v. *Paint Works & Can Company,* 301 Ill., 102, 107.

The rule in determining whether a contract is ambiguous is to explore the whole contract to see if the contro-

versial provision, as it stands in its context, is susceptible of only one interpretation. (*Buchanan* v. *Swift*, 130 F. 2d 483 (CA7). And if, after checking the sentence with other provisions of the contract, it may be read in different senses, it is by that possibility ambiguous.

II

Where a check is tendered in payment and kept an unreasonable length of time, it is treated as an accord and satisfaction whether used or not.

*Day-Luelwitz Lbr. Co.* v. *Serrell*, 177 Ill. App. 30;
*Seidman* v. *Chicago Eye Shield Co.*, 267 Ill. App. 77.

It is not necessary that a formal tender of a check be made in order to make an accord and satisfaction, if accepted. It is sufficient that the check is received and used with knowledge of the theory on which it is written.

*Janci* v. *Cerny*, 287 Ill. 359.

**Argument**

This suit is brought for a declaratory judgment to (1) settle the rights of the parties under a contract, and (2) declare that those rights have been settled by an accord and satisfaction. The litigation will definitely destroy defendant's rights or establish them; and likewise those of plaintiff, whichever way the law suit turns.

So far the two courts are in disagreement. The trial court held for plaintiff, the Court of Appeals for defendant.

It is important therefore that the basic rights of the parties be correctly established as the whole litigation turns upon that event.

We respectfully suggest that this court should take this case if it appears that the Court of Appeals has erred in deciding upon either the question of ambiguity of the contract, or upon the question of accord and satisfaction.

We do not find that such a question has been here decided. We present short suggestions upon each point.

**Suggestion I**

We respectfully suggest that the Court of Appeals was clearly in error when it ignored the evidence heard by the trial court, and held that there was no ambiguity in the contract.

It is a general rule that business contracts must be construed with business sense, and as they naturally would be viewed by intelligent men of affairs (*North German Lloyd* v. *Guaranty Trust Co.*, 244 U. S. 12, 24). Here was a purchase of a going concern where everything was being taken over except the stock pile or inventory of repair parts. $25,000 worth of the pile was purchased immediately, and outright, and title passed by the contract; the remainder was to be shipped to Superior, Wisconsin, F.O.B., factory of the seller stored at plaintiff's expense, and resorted to as occasion required. These were highly necessary repair parts to be used in servicing and repairing stokers, which service plaintiff took over; and plaintiff was required to report monthly as the parts were used, and remit with the report. Plaintiff agreed to purchase and pay for within one year parts that could be reasonably utilized. The $25,000 worth purchased outright were to be *selected* from the stock pile. The contract does not say that the parts used by plaintiff in due course of business were to be "selected" within the year; they were to be purchased as the business of servicing and repairing proceeded from day to day.

There was an option given for *one year* only to purchase the entire stock pile; and at the end of the year, defendant had the right to take back the remaining parts and sell in the open market, which indicates retention of title, and a limitation of one year to the purchase of parts.

Normally, one would inquire why such an arrangement as found in paragraph B-2 were made. The answer is found in the evidence. The stock pile contained much junk. A description of this miscellaneous collection of unsorted parts was given by the witness, Bottenfield (See Tr. 219-200).

Part of this stock pile got there as result of failure to observe a periodical scrapping or junking process of obsolete inventory. This process had been neglected for some years. It was this mixed up inventory that was shipped to Superior, Wisconsin, and which plaintiff had refused to purchase in bulk, but took only a pay-as-used basis.

The period of one year is the basis of the contract as to stokers and parts, and after that the contract contemplates the plaintiff would be concerned only with royalties.

In *Armstrong* v. *Paint Works and Can Co.*, 301 Ill. 102, 107, the court remarked that it was easy to define an ambiguity, but sometimes difficult to apply the definition. There the court held that it was proper to hear testimony where the word "required" had enough meanings to create an ambiguity. In this case, had the sentence in paragraph B-2 read "purchase and pay for *during* one year from date hereof" instead of "*within* one year" there would be no ambiguity; and the question is, can the word "within" be reasonably construed to mean "during" in view of all circumstances and when all facts are known. The trial court so held.

The evidence heard clearly demonstrates that the fact was that the intention of the parties was that the inventory of parts would be resorted to *during* the first year of the life of the contract, at the end of which plaintiff's factory would be in full operation,—which it was in six months (Tr. 256).

Thus, it is seen that if the word "within" may be held to mean "during" in view of the known facts, the contention of plaintiff would be within the holding and authority of the Illinois Supreme Court in *Armstrong* v. *Paint Works & Can Co.*, 301 Ill. 102, 107.

**Suggestion II**

The sense of Paragraph B-2 is not complete as written and oral evidence was necessary to fix the intention.

While Paragraph B-2 specifies the time within which the purchase of parts is to be made and paid, it does not state the time within which the stock piles of stoker parts are to be resorted to by the Buyer; and it is obvious that the sentence is not complete, as it omits to state a material fact, carried in the minds of the parties and mutually understood, but not specifically put in writing. The period of time during which the Buyer was to resort to the stock piles of Defendant and Whiting Corporation was a highly material fact, and failure of the parties to deal with that fact specifically has led to this difference of opinion and litigation.

As the period of time is material and is omitted from the contract, the Court must look at the whole negotiations between the parties to settle what was the intention of the parties and in what sense the language was used.

Grammatically construed, we suggest, the sentence would conclude "within one year from the date hereof." So, the sentence would read:

> "purchase and pay for within one year from the date hereof all of that portion of the remainder of said stock of parts which can reasonably be used by the Buyer," within one year from the date hereof.

## The Court of Appeals Adds Its Own Language to the Sentence

Being an incomplete sentence, it takes its time from the period of time specified in the sentence, which is one year—if it must be decided from the quoted part standing alone; but the Court of Appeals, and the Seller, say that the sentence is reasonably susceptible of being understood in another sense, and that the sentence should be read:

> "purchase and pay for within one year from the date hereof all of that portion of the remainder of said stock of parts which can reasonably be utilized by the Buyer" at any time within the year or thereafter.

Obviously, to complete the sentence, words must be added to give expression to either sense attributed to it.

## The Court of Appeals Has Added the Material Provision to the Contract

The Court will see that, to make the sentence complete upon its face, the Court has added its own language to the sentence; for the period of time of utilization of the parts was not stated in the sentence, or the contract and that period of time is material, and the Court has added a material provision to the contract.

## The Approach of the Court of Appeals to the Question Is Wrong

We respectfully suggest that the Court of Appeals has lifted from its context the sentence:

> "And to purchase and pay for within one year from date hereof all that portion of the remainder of said stock of parts which can reasonably be utilized by the Buyer * * *"

In other words the Court has given the sentence a mental rather than a judicial construction.

Ambiguity depends here, as always, upon the face of the document; but what it really means, and what is the intent of the parties, depends upon the whole picture, and not just simply upon an examination of the bare provisions of the contract not inconsistent with the controversial paragraph.

In other words, the Court of Appeals has, in effect, rewritten the sentence, which is to admit that the sentence, so rewritten, was ambiguous as it stood.

And it is suggested that those added words do not fit in the contract and can be made to fit only by modifying some other part of the contract.

**Rule in Determining Ambiguity**

The rule in determining whether a contract is ambiguous is to explore the whole contract to see if the controversial provision, as it stands in its context, is susceptible of only one interpretation. (*Buchanan* v. *Swift,* 130 F. 2d 483 (C. C. A. 7)). And if, after checking the sentence with other provisions of the contract, it may be read in different senses, it is by that possibility ambiguous.

In this connection, we point out that there are three distinct times of payment: (1) Immediately upon signing the contract $50,000.00 for all items in A-1; (2) after signing the contract, selecting, and paying for immediately, $25,000.00 worth of parts; and (3) to purchase and pay for within a year the reasonably utilizable portion of the remainder of the stock pile, which is not an immediate purchase and not intended to be. Parts are not purchased until used, for the title here remains at all times in the Seller until used by the Buyer.

**Paragraph B-4 Applies to Both Inventories**

Now, we point out that the restraint upon manufacture or purchase elsewhere of "any such stoker parts" refers to both inventories—that of Whiting Corporation and that of the Defendant; and the provision of B-4 which says that the Plaintiff shall refrain from manufacture or purchase elsewhere until the inventory of each corporation "shall have been completely exhausted," refers to exhaustion within the respective limitations; that is, exhaustion within one year in B-2, and exhaustion within a reasonable time in B-3; that is, whichever happens first, the time limitations, or, the exhaustion of parts.

**By Adding Words to B-2 the Court of Appeals Has Added Another Ambiguity**

It becomes increasingly obvious when the opinion of the Court of Appeals is contrasted with those of counsel for the respective parties, and that of the trial court, that Par. B-2 as it stands, forms the basis of two theories, or constructions, or interpretations, back of which plausible arguments may be marshalled. But defendant's construction can be maintained, as the Court of Appeals maintains it, only by adding to B-2 words that are not in the contract; while the construction contended for by plaintiff is consistent with every other provision of the contract; and ending the sentence with the words "within one year from date hereof," we contend is the grammatical construction to be given the sentence.

We therefore respectfully suggest that paragraphs B-2, B-3 and B-4 do create an ambiguity which the Court of Appeals in fact recognizes in its opinion but which it, in its language, says does not exist.

Paragraph C-2 does not, as the Court of Appeals says, give the Defendant an option to sell:

> "in the open market, or to otherwise dispose of as they may see fit, all such items . . . as have not theretofore been purchased by the buyer pursuant to the terms of this contract."

It is respectfully suggested that that is not an *option*, it is a right reserved; for title was at all times reserved to Defendant, and the right reserved was made in view of the restrictions inherent or implied in the contract. It is clearly inconsistent with the interpretation by the Court of Appeals in Paragraph B-2, for, if that Court's interpretation is to prevail, then there would remain nothing in the Defendant's stock pile that was usable, and sale in the open market would be of no contractual or practical benefit. The fact is that Paragraph C-2 recognizes that the stock pile may not be exhausted at the end of the year and that the remainder in the pile is still the property of the Defendant, and that sale by the Defendant will not breach its undertaking with the Plaintiff; or, if it would, the provision is written to cover such breach.

Paragraph C-2 also recognizes that there is an open market for such parts. And the Court overlooks the fact that the Plaintiff is the only company entitled to manufacture the types of stokers to which those parts apply and if it has used the stock pile to exhaustion there is nothing remaining for an open market of parts; nor would an open market for obsolete and defective parts have reasonably been contemplated by the parties. The point is, if the Plaintiff could not, in its service of stokers, reasonably utilize parts in the stock pile, then there would be no open market for obsolete, defective or unusable parts.

We therefore suggest that the Court of Appeals erred in holding that the contract was unambiguous.

**Suggestion III**

**The background of circumstances and the conduct of the parties in relation to it amounted in law to an accord and satisfaction of the disputed question of liability.**

We respectfully suggest that the Court of Appeals misconceived the record as to the claim that the use by defendant of the check $6,533.75 constituted an accord and satisfaction of plaintiff's liability under paragraph B-2, for this court says that the letter which accompanied the check:

> "constitutes the only evidence in the record upon which the finding could be based" (Opinion, Tr. 463).

We point out that there was more for a jury (if there had been one), or the District Court, to base its decision upon than the mere letter accompanying the check, for there was the long existing and litigious dispute between the parties over the *theory of liability*, one contending the debt existing was for all reasonably usable parts in the stock pile and the other that it was only for the parts reasonably usable within one year. The defendant could not help but know that the audit was based upon plaintiff's theory and that the check was likewise based upon the plaintiff's theory and not upon defendant's theory. The check was the sum plaintiff claimed was the true debt figured upon one way of reading the contract; and was a sum which defendant disputed as the real debt, for defendant openly claimed, and had long claimed, that plaintiff owed for all reasonably usable parts in the stock pile. Obviously the check was sent to be used on the theory that that figure represented the result of an accounting between the two business concerns as to the true debt existing and the meaning of that audit could not have been mistaken by defendant.

Further, there was the exchange of letters bitterly disputing the theory of liability which controlled the amount due; the testimony as to the conversations between the officers and agents of plaintiff and defendant and their actual disputes over their respective interpretations of the contract; the Eisner & Lubin reports and audit fixing the amount due under the theory of plaintiff; the testimony of Jack Schlosser of the firm of Eisner & Lubin, auditors; and the conduct of defendant in holding plaintiff's check for substantially two months before depositing it, with conscious knowledge that the check was indisputably offered with the accompanying auditor's summary of usage of stoker parts as its support, in full satisfaction of all liability as to the disputed inventory.

How could the check and letter be considered less than a tender in full of all liability when the letter enclosing the check stated:

> "We are inclosing the auditor's summary of usage of stoker parts which also indicates the balance of inventory belonging to you at August 31, 1945" (see letter, Opinion, Tr. 463).

It is further pointed out that in April 1945 the parties were still disputing over the items selected for the $25,000 cash purchase of parts from the inventory and plaintiff wrote to defendant plaintiff's Ex. 9 (Tr. 350), which says that defendant's

> "letter dated April 2, makes your motives quite plain, which are to reopen the $25,000 matter and assist you in liquidating outside the contractual requirements another eight or ten thousand dollars of inventory. At no time either prior to or after the signing of the agreement have we ever contemplated purchasing from you one dollar's worth of obsolete or inactive inventory which could not be liquidated within a year."

As far back as July 2, 1945, plaintiff by letter (Tr. 35) urged defendant to cooperate and

> "reconcile the several records and perhaps come to some decision as to what is to be done with the balance of inventory on hand when the year expires."

To plaintiff's letter just quoted defendant replied on July 9, 1945 (Tr. 351):

> "As to the balance of the inventory on September 2, 1945, we have had no thought but that you would send your check within the one year period stipulated in the agreement."

On August 27, 1945, as the end of the year neared, plaintiff wired defendant asking for instructions as to disposition of the inventory,

> "which we have not reasonably been able to utilize during the year of the contract. Failing to receive your instructions we shall warehouse same at your expense" (Tr. 411).

To the above telegram and a letter confirming it defendant replied (Tr. 411-412) on August 29, 1945;

> "As the Seller we will not acquiesce in a return to it of said inventory."

To defendant's letter of August 29, 1945 plaintiff wired on August 31, 1945 (Tr. 412):

> "The contract of September 2, 1944 provides that you can dispose of this inventory in any way you see fit, therefore we consider this inventory your responsibility at the expiration of one year. Accordingly we are instructing our Superior plant to warehouse and insure this inventory for your account."

To plaintiff's foregoing telegram defendant replied giving its interpretations of the contract, crystalizing the dis-

putes, protesting the warehousing of the remainder of the stock of parts for its account and expense, insuring, handling, etc.; offering to take back any parts "clearly not reasonably usable" by plaintiff and market them as it saw fit (Tr. 413); but stated concerning paragraph C-2 of the contract:

> "It is clear from a reading of that paragraph, however, that it merely gives us the right to dispose of such parts in the open market, but does not obligate us to do so." (Tr. 414.)

Then on September 10, 1945 plaintiff wrote defendant asking what procedure plaintiff should follow should it

> "receive an order for a part or parts in this inventory and at what price we should withdraw it" (and stating) "we do not feel we have the authority to withdraw any of the items from it." (Tr. 414.)

Defendant demands a check on its theory of the contract.

To plaintiff's letter of September 10, 1945 the defendant replied on September 29 that the contract provided that plaintiff should purchase and pay for all stoker parts as might be reasonably utilized by plaintiff

> "until the inventory mentioned shall have been completely exhausted. We expect you to fulfill this obligation. Will you therefore mail us your check in payment and oblige. The prices, of course, are those specified in paragraph A-2 of the contract." (Tr. 415.)

To that letter of September 29, 1945, plaintiff replied on October 8, 1945, regretting that they could not agree

> "on the question of the residual inventory on August 31. The inventory is yours. Under the circumstances, and, considering the fact that you will not give us written instructions permitting us to use the inventory

and report and remit as heretofore, we are placing this inventory in Superior warehouse pending your next action" (Tr. 415).

To that letter defendant tartly replied on October 9, 1945, that its next action was to

> "respectfully request that you complete payment for this merchandise as you undertook to do." (Tr. 416.)

The auditors for the parties then took over in an effort to reconcile the accounts of the parties and usages of parts from the inventory of defendant. This they accomplished as shown by testimony and by defendant's letter of October 16, 1945, stating the results of the work of the auditors representing the parties (Tr. 356).

**Plaintiff Sends Its Check on Its Interpretation of the Contract, and Tenders the Inventory**

Next came the letter of November 2, 1945 enclosing plaintiff's check and stating

> "Which brings our account with you in complete accord with the results of the audit. • • • We are enclosing the auditor's summary of usage of stoker parts which also indicates the balance of inventory belonging to you at August 31, 1945." (Tr. 352.)

There was the inventory tendered back with the check. They had disputed over it for several months. Defendant demanded a check for the amount claimed due to it on its theory; plaintiff sent defendant a check for the sum the auditors said was due on plaintiff's theory. The letter enclosing the check said:

> "We are enclosing the auditor's summary of usage of stoker parts which also indicates the balance of inventory belonging to you at August 31, 1945." (Tr. 463.)

**The Parties Acts Speak the Accord and Satisfaction**

We respectfully suggest that the acts of the parties speak with all the force of words. Plaintiff thereby plainly said here is what we owe you under the contract and here is the balance of the inventory fully itemized by the audit. Defendant had specifically demanded pay for the balance of the inventory. In reply plaintiff tendered to defendant the inventory and its check for what the audit showed and what the letter referred to.

The trial judge had to decide what the legal effect was of a demand for payment of the inventory on defendant's theory and a check for payment delivered on plaintiff's theory; and retention of that check for two months and finally using it upon the basis upon which it was given.

**Retention of a Check for an Unreasonable Time Is an Accord and Satisfaction**

We call the Court's attention to certain Illinois cases where the holding of a check offered in payment of a disputed account has been held to be an accord and satisfaction of the disputed obligation.

In *Day-Luelwitz Lbr. Co.* v. *Serrell,* 177 Ill. App. 30, it appeared that the claim sued for was correct as to items and amount but defendant claimed damages for non-shipment of orders and rendered a statement, deducting the damages claimed, and sent a First National Bank draft on a Seattle firm in payment of the disputed account, saying:

> "We deem this is the only right and proper way to close the matter up" (P. 32).

The draft was kept for three months before it was offered back.

The court held that the draft had been held an unreasonable period of time and that an accord and satisfaction

resulted and reversed the trial court and held that such a check should be negotiated promptly or returned promptly and said:

> "The neglect of the defendant in error to return or act in any way on the draft was equivalent in its effect on the plaintiff in error to cashing it,—holding the money for three months, or more, and then offering to return it. The defendant in error must be held to have accepted the draft in payment of its account against the plaintiff in error, and the jury should have been so instructed" (P. 39).

The court held there that holding the draft for three months was an accord and satisfaction as a matter of law.

In *Seidman* v. *Chicago Eye Shield Company*, 267 Ill. App. 77, it appeared that an auditing firm agreed to do some auditing work for an income tax proceeding before the tax department for $2,500. A dispute later arose when plaintiff claimed for services not contemplated in the contract. $1700 had been paid. On June 2, 1925, defendant sent its check for $750, stating:

> "We are enclosing herewith our check in the amount of $750 which balances our account as per contract with you." (P. 81).

On June 15, 1925 Seidman wrote acknowledging receipt of the $750 check and stating:

> "Our fee to date is $7,500, unless we hear from you by June 18, 1925 by way of a full settlement of our claim, we will apply your check for $750 against your account and take further action for the recovery of the balance."

However, the check for $750 never was cashed and was produced on the hearing. The court there held that:

> "The circumstances and conduct of the parties established an accord and satisfaction as a matter of law, which justified the court in directing a verdict for defendants." (P. 83).

And the court further held:

> "Where a debtor offers to settle and compromise the debt by sending to the creditor a check in the amount of such offer and compromise, it becomes the duty of the creditor either to accept or reject it, and he has no right to cash the check and thereby obtain the benefit of such offer without its accompanying burden of compromise" (P. 83).

The court noted that the case there went one step further because the plaintiff there refused to accept the check in full settlement, held the check until trial, and then contended that the retention of the check was not in law an accord and satisfaction. The court held, however, that retention of the check was an assent in fact to the condition on which offered and that the creditor was bound by it notwithstanding his protest, and that if the payment tendered was not satisfactory to him it was his duty to immediately repudiate the offer and return the check (P. 84).

In the case of *Janci* v. *Cerny,* 287 Ill. 359, it appeared several partners claimed that one partner had made a secret profit. They met on a Sunday and the accused partner made an accounting. The following day he wrote checks which the several partners picked up during the week. By bill for accounting they sought to overthrow the accounting. Cerny pleaded an accord and satisfaction. There were no letter, or formal offers, or tenders, with the checks,—the parties all knowing the conditions under which the checks were written. The court held:

> "The acceptance of payment of an amount which the debtor claims to be the full amount due and tenders

in settlement of the demand constitutes an accord and satisfaction" (P. 365).

**Circumstances and Conduct May Create an Accord and Satisfaction**

We respectfully suggest that it was a question for the trial judge under all of the surrounding circumstances, and the conduct of the parties, whether the facts created an accord and satisfaction; and unless the finding of the District Court is against the manifest weight of the evidence or against the law, its findings should not be disturbed. We respectfully suggest that under all the circumstances, the question, whether fact or law, was correctly decided by the trial judge.

**Conclusion**

Wherefore, we respectfully suggest that the judgment and opinion of the Court of Appeals is erroneous and that this court should grant the Writ and take this case for decision.

Respectfully submitted.

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